STATE OF NEW HAMPSHIRE
SUPREME COURT

ALEXANDER J. WALKER, JR.

v.

AARON DAY

No. 2019-0236

APPEAL FROM THE HILLSBOROUGH COUNTY SUPERIOR COURT NORTHERN DISTRICT PURSUANT TO SUPREME COURT RULE 7

REPLY BRIEF OF THE APPELLANT ALEXANDER J. WALKER, JR.

Matthew R. Johnson (Bar No. 13076)
Devin K. Bolger (Bar No. 270150)
DEVINE, MILLIMET & BRANCH, PROFESSIONAL ASSOCIATION
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
mjohnson@devinemillimet.com
dbolger@devinemillimet.com

Oral Argument by: Matthew R. Johnson
August 19, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

Constitutional Provisions

CONSTITUTIONAL PROVISIONS INVOLVED

N.H. Const. pt. I, art. 14

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

ARGUMENT

I. The trial court decided, and thereby preserved, the issue of whether the record at the pleading stage is sufficient to establish privity.

An issue actually decided by a trial court is preserved for review. *See Mortg. Specialists, Inc. v. Davey*, 153 N.H. 764, 787 (2006) ("[B]ecause the trial court did not refuse to rule on the propriety of the sanctions with respect to the violation of the preliminary injunction [even though it was raised for the first time on motion for reconsideration], this issue was properly preserved for appellate review."). Here, the trial court considered, and rejected, Mr. Walker's argument that privity cannot be inferred from mere factual allegations. App. 130-31; Add. 013. The issue is preserved.[1]

II. The "record" at the motion to dismiss stage is insufficient to establish privity.

Res judicata is an affirmative defense and must be proved by the defendant. *See Gray v. Kelly*, 161 N.H. 160, 164 (2010). Though Mr. Day argues the trial court was required to accept Mr. Walker's allegations as true, this suggestion conflates the standards governing a motion to dismiss for failure to state a claim and a motion to dismiss based on res judicata. *Compare Buckingham v. R. J. Reynolds Tobacco Co.*, 142 N.H. 822, 825 (1998) (trial court must accept pleaded facts as true in deciding motion to

[1] To remove any doubt, Mr. Walker again pressed this issue in his objections to Mr. Day's first and second renewed motions to dismiss. App. 185, 233. The trial court had ample opportunity to correct its error. Add. 14-16 (ruling on both renewed motions to dismiss); *cf. Mortg. Specialists, Inc.*, 153 N.H. at 786 ("[W]here an issue is raised for the first time in a motion for reconsideration and failure to raise the issue earlier did not deprive the trial court of a full opportunity to correct its error, the issue has been preserved for our review.").

dismiss for failure to state a claim), *with Gray*, 161 N.H. at 164 (noting that unlike a motion to dismiss for failure to state a claim, a motion to dismiss based on res judicata requires the defendant to prove the affirmative defense applies); *see also Dembiec v. Town of Holderness*, 167 N.H. 130, 133 (2014) ("[W]hen the motion to dismiss raises certain defenses, the trial court must look beyond the petitioners' unsubstantiated allegations . . . ."). The trial court's failure to properly measure Mr. Day's res judicata defense against evidence was reversible error.

III. Co-conspirators do not share any kind of relationship justifying nonparty preclusion.

Mr. Day apparently agrees that he and the Gill Defendants do not share a functional relationship sufficient to justify nonparty preclusion. Appellee's Opp. Br. 21 ("The trial court did not, nor was it required to, base its determination on Mr. Day and the Gill Defendant's functional relationship."). This admission is important. Mr. Day stands in exactly the same position as he did before the Defamation Action, and his interests remain unaffected by the judgment against the Gill Defendants.

Mr. Day nonetheless believes that judgment immunizes him. He argues that his relationship with the Gill Defendants qualifies as a "substantive" relationship that binds him, in a purely theoretical sense, to the earlier judgment. The relationship between joint perpetrators, however, does not fall into any recognized category of substantive, pre-existing relationships that automatically justifies nonparty preclusion in New Hampshire. In tacit recognition of this, Mr. Day urges an "expanded" concept of nonparty preclusion. Appellee's Opp. Br. 25 ("The unique facts and circumstances of this matter justified an *expanded* application of

privity" (emphasis added)); *id.* (noting the lower court applied "an *expanded* view of privity" (emphasis added)). The Court should decline Mr. Day's invitation to create new law.

The law is settled in New Hampshire. Conspirators, like other tortfeasors, may only be precluded upon a showing of involvement in the underlying suit. *See Aranson v. Schroeder*, 140 N.H. 359, 369 (1995). Mr. Day attempts to distinguish *Aranson* on the grounds that there, the plaintiff asserted collateral estoppel against the defendant whereas here, the defendant invokes claim preclusion against the plaintiff. Appellee's Opp. Br. 23. This distinction has no legal significance. The same privity analysis applies to both species of res judicata (claim preclusion and collateral estoppel) and regardless of whether preclusion is asserted against the plaintiff or defendant.[2]

Mr. Day's other attempts to sidestep *Aranson* are no more availing. Mr. Day observes that in *Aranson*, the attorney/co-conspirator was directly liable on the underlying tort whereas here, Mr. Day's liability is derivative. But privity does not spring from derivative liability, as Mr. Day suggests. *See Daigle v. City of Portsmouth*, 129 N.H. 561, 571-72 (1987) (rejecting theory of privity between employee and derivatively liable employer). Otherwise, the employee in *Waters* would have been protected by the earlier consent decree involving his employer, *see Waters v. Hedberg*, 126 N.H. 546, 549 (1985), the officer in *Daigle* would have been precluded from litigating issues decided earlier against the City of Portsmouth, *see*

[2] Except that collateral estoppel may be raised by a new party against parties to the underlying suit (or their privies). *Caouette v. Town of New Ipswich*, 125 N.H. 547, 554 (1984).

Daigle, 129 N.H. at 572-74, and the attorney in *Aranson* would have been bound by the fee award against his former clients, *see Aranson*, 140 N.H. at 369; *see also* Restatement (Second) of Judgments § 51(4) (as between directly and vicariously liable parties, a judgment against one does not generally have preclusive effect as to the other); Restatement (Second) of Judgments § 49 cmt. a (explaining that the prevailing rule allowing for separate and sequential recovery against joint wrongdoers applies where "the conduct of the actual wrongdoer is legally chargeable to more than one person, as . . . under the principle of *respondeat superior*").

Mr. Day offers no convincing justification for treating the relationship between co-conspirators differently than other relationships of derivative liability. He asserts, "[u]nlike other forms of derivative liability, conspirators involve a level of intent and must agree on the objective to be achieved, especially when the tortious conduct forming the conspiracy is committed by only one conspirator." Appellee's Opp. Br. 30. Yet these circumstances are not unique to co-conspirators. In the respondeat superior context, there is just as likely to be only one direct wrongdoer. An action against just the employer requires evidence of the nonparty employee's acts and omissions. Further, elemental to respondeat superior is an *agreement* between the employer and employee that the latter will act at the direction and on behalf of the employer. *See Trahan-Laroche v. Lockheed Sanders*, 139 N.H. 483, 485 (1995) (noting that if tort was within scope of agreement between employer and employee, respondeat superior finding would be supportable); *Richard v. Amoskeag Mfg. Co.*, 79 N.H. 380, 383 (1920) (whether tort was within scope of employment depends, in part, on whether employee acted with purpose to serve employer). At its core, the

relationship between co-conspirators does not meaningfully differ from that between employer and employee. The law treats these relationships identically for nonparty preclusion purposes, and for good reason.

As this Court recognized in *Daigle*, the interests of directly and derivatively liable parties are often adverse. *Daigle*, 129 N.H. at 573-74 (citing potential for conflict of interest as the basic reason for rejecting privity by employment); *see also Hallisey v. DECA Corp.*, 140 N.H. 443, 446 (1995) (concluding that the defendant could not use privity to shield itself because "the defendant's bankruptcy at the time of the earlier proceeding extinguished any presumption that the interests of the defendant and DeCarolis so coincided at the time of the earlier proceeding that the judgment against one should have preclusive effect against the other"). As between such parties, preclusion is presumptively inappropriate. It becomes justified only upon a factual showing that the nonparty's interests were actually advanced or defended in the underlying litigation.

By contrast, in each of the substantive, pre-existing relationships held to automatically justify nonparty preclusion (with no requirement of functional involvement in the underlying litigation), the inherent mutuality of interests between parties to the relationship obviates any need to inquire factually whether one party was affected in a legally significant sense by the litigation results of the other. For example, a successor-in-interest stands in the shoes of her predecessor for all relevant purposes. *See* Restatement (Second) of Judgments § 43. An unincorporated association with no legal existence apart from its members has no separate interests. *See id.* § 61. A closely held corporation and its sole owner likewise have complete identify of interests. *See id.* § 59. In these examples, obvious

reasons exist for treating the parties to the relationship as one and the same for litigation preclusion purposes. The same is not true of co-conspirators, regardless of how closely they join forces to cause the underlying loss.

And why the closeness of Mr. Day's relationship with adjudged wrongdoers should protect him is beyond reason. Had Mr. Walker *lost* the Defamation Action, Mr. Day would likely, and rightly, invoke collateral estoppel as to issues actually decided against Mr. Walker in the previous action. The likely predominance of identical issues in this action would perhaps doom it completely.[3] But this is not a case where the plaintiff seeks a second bite at the apple on issues or claims determined adversely to him, as in, for example, *Airframe*. *See Airframe Sys. v. Raytheon Co.*, 601 F.3d 9, 13-14 (1st Cir. 2010). This case presents the converse scenario, where the defendant's liability is all but decided.

In fact, it is doubtful that courts recognizing the close relationship standard would even apply it here. The standard was applied, in the seminal cases, against *unsuccessful* plaintiffs in circumstances where courts today would recognize defensive nonmutual collateral estoppel. *See Gambocz v. Yelenciscs*, 468 F.2d 837, 841-42 (3rd Cir. 1972) (citing *Bruszewski v. United States*, 181 F.2d 419 (3d Cir. 1950) and referring to the close relationship standard as the *Bruszewiski* doctrine); *Bruszewski*, 181 F.2d at 421 (collecting early 20th century cases and noting, "a party who has had one fair and full opportunity to prove a claim and has *failed in that effort*, should not be permitted to go to trial on the merits of that claim

[3] Should the lower court's judgment be reversed and the case remanded, Mr. Day could likely invoke collateral estoppel against Mr. Walker on issues actually decided in the Defamation Action. Mr. Day could, for example, estopp Mr. Walker from seeking higher damages than those awarded in the Defamation Action.

a second time." (emphasis added)). Though the standard has been used where collateral estoppel was technically inapplicable, *see, e.g.*, *Gambocz*, 468 F.2d at 841-42 (collateral estoppel inapplicable because first disposition was unaccompanied by factual findings), the overwhelming majority of courts to have applied the standard have done so in a manner closely resembling defensive collateral estoppel, barring *unsuccessful* plaintiffs from retesting the same, tired theories on closely related defendants. *See, e.g.*, *Fowler v. Wolff*, 479 F.2d 338, 339 (8th Cir. 1973) (unsuccessful plaintiff barred from pursuing new, closely related defendants on same theory as first action); *Poster Exchange, Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 121-22 (5th Cir. 1975) (same); *McLaughlin v. Bradlee*, 599 F. Supp. 839, 843-45 (D.D.C. 1984) (same); *Betances v. Quiros*, 603 F. Supp. 201, 203 (D.P.R. 1985) (same); *see also TMTV, Corp. v. Mass Prods.*, 645 F.3d 464, 473 (1st Cir. 2011) ("Claim preclusion extends beyond parties and their privies only in unusual circumstances; consider, for example, a plaintiff, *unsuccessful against an initial defendant*, seeking to litigate identical claims against new but closely related defendants." (emphasis added)).[4] In these contexts, where plaintiffs press meritless claims repeatedly, concerns of gamesmanship and waste of judicial resources are most salient.

But where the plaintiff prevails on the underlying suit, cannot recover on the judgment, and then pursues a different wrongdoer (perhaps

[4] Tellingly, 13 the 14 cases cited on pages 5 and 6 of trial court's May 3, 2018 Order on Mr. Walker's Motion for Reconsideration (to support the notion that conspirators are necessarily in privity with one another) concerned plaintiffs who were unsuccessful in the underlying suits (and in the other decision, *Vohra v. Vora*, 86 Va. Cir. 412 (2013), the underlying disposition cannot be gleaned from the reported decision). *See* Add. 11-12.

believed initially to be insolvent, immune, or beyond the jurisdiction of the court), the plaintiff's right to recover is paramount.[5] *See* N.H. Const. pt. I, art. 14 ("Every subject of this state is entitled to a certain remedy . . . for all injuries . . . ."). Absent a showing of Mr. Day's functional involvement in the Defamation Action, preclusion here undermines New Hampshire res judicata rules and violates the right of Mr. Walker, to one, single recovery for his injuries. As applied by the court below against Mr. Walker—for the first time ever in New Hampshire, as far as reported cases reveal—the close relationship standard has no place in this State's jurisprudence.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

The trial court erred when it dismissed the Conspiracy Action on res judicata grounds even though the defendant, Mr. Day, never proved he was in privity with the Gill Defendants in the Defamation Action. The trial court's judgment should be reversed and the case remanded for further proceedings. Mr. Walker respectfully requests fifteen minutes of oral argument before the full Court. Matthew R. Johnson will present oral argument for the appellant, Alex Walker.

[5] Mr. Day suggests Mr. Walker schemed to take advantage of the *pro se* Gill Defendants and then somehow hold Mr. Day to the results of that litigation, *see* Appellee's Opp. Br. 8 ("[Mr. Walker] knew he intended to sue Mr. Day at a later date . . . but chose not to name him,"; *id.* at 30 ("He all along planned to attempt recovery, separately and sequentially, against Mr. Day"), but this strategy would have been ill-advised. Mr. Walker can likely be prevented from seeking higher damages in this action and he cannot bind Mr. Day to any issue decided against the Gill Defendants.

Respectfully submitted,

ALEXANDER J. WALKER, JR.

By his Attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: August 19, 2019 By: */s/ Matthew R. Johnson*

Matthew R. Johnson, Esq. (Bar No. 13076)
Devin K. Bolger, Esq. (Bar No. 270150)
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
mjohnson@devinemillimet.com
dbolger@devinemillimet.com

CERTIFICATION OF COMPLIANCE

I hereby certify that this reply brief complies with Rule 16(11) because this brief contains 2,345 words exclusive of pages containing the table of contents, table of authorities, text of pertinent statutes, and addendum; and Rule 26(7) because, on this 19th day of August, 2019, copies of this brief were forwarded to Peter L. Bosse, Esq. and Jonathan P. Killeen, Esq., counsel of record for Aaron Day, via the Court's electronic filing system's electronic services.

Dated: August 19, 2019 By: */s/ Devin K. Bolger*

Matthew R. Johnson, Esq. (Bar No. 13076)
Devin K. Bolger, Esq. (Bar No. 270150)
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
mjohnson@devinemillimet.com
dbolger@devinemillimet.com